Filed 12/14/20 In re C.C. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C.C. et al., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B306636 (Super. Ct. Nos. 18JV00488, 18JV00489, 18JV00490, 18JV00491) (Santa Barbara County)
SANTA BARBARA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. L. L., Objector and Appellant.	

L.L., the biological mother of A.D., M.S., C.C., and J.S., appeals from an order terminating her parental rights and selecting adoption as the permanent plan. (Welf. & Inst. Code,

§ 366.26.)[1] Mother contends (1) the juvenile court erroneously found there is clear and convincing evidence that it is likely the children will be adopted within a reasonable time, and (2) notice was not provided to the Navajo Tribe as required by the Indian Child Welfare Act (ICWA). The ICWA's notice requirements were not violated, but the finding of adoptability as to one of the children – M.S. – is not supported by substantial evidence. As to M.S., we reverse. We affirm as to the other children.

This is mother's second appeal in this matter. She previously appealed from an order removing the children from her physical custody. In a nonpublished opinion filed in 2019, we affirmed the jurisdiction and disposition orders as to the three older children – A.D., M.S., and C.C. As to the younger child, J.S., we reversed and remanded with directions. (*In re C.C. et al. v. L.L.* (Oct. 16, 2019, B296673).) We take judicial notice of the record in the previous appeal.

Facts Relating to Adoptability

Mother's parental rights were terminated on July 2, 2020. On that date the ages of the children were as follows: A.D. (male) – 17 years, M.S. (female) – 16 years; C.C. (male) – 14 years, and J.S. (female) – 12 years. A.D. and C.C. are hereafter referred to as "the boys."

Prior to the section 366.26 hearing, the Child Welfare Services unit (CWS) of the Department of Social Services prepared a report signed on June 1, 2020. The report includes a two-paragraph section analyzing the likelihood of the children's adoption. The section states: "In spite of their ages, [they] are adoptable children. The children's current caretaker reported he

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[1] Unless otherwise stated, all statutory references are to the Welfare and Institutions Code.

is not interested in Adopting, or taking Legal Guardianship, of the children. At a Child Family Team . . . meeting on May 21, 2020 [this meeting was conducted via a conference call], all the children said they wanted to be adopted. [The boys] said they prefer to be adopted by their maternal aunt and uncle, [S.D. and E.D.], who reside in Vacaville, California. [M.S.] said she would like to be adopted by her second cousin, [V.S.]. [J.S.] said she desires to be adopted by her paternal aunt, [J.G.] who resides in Raleigh, North Carolina. [¶] The Child Welfare Worker . . . is in the process of completing Relative Assessments on the potential adoptive parents. Although [M.S.] requested to be adopted by her former caretaker/second cousin, [V.S.], CWS has assessed that [V.S.] will not be approved for placement. If [M.S.] cannot be placed with [V.S.] then her second choice is to move to North Carolina with her sister [J.S.] and be adopted by [J.S.'s] paternal aunt."

CWS explained why it had concluded that M.S.'s second cousin, V.S, will not be approved for placement of any of the children: "On January 4, 2019, the children were initially placed with . . . [V.S.]. . . . However, during [the placement she] was arrested for Driving while Under the Influence (DUI). This was [V.S.'s] second DUI; therefore, the children needed to be removed from her care." During a subsequent meeting between V.S. and a social worker, "[V.S.] cried and said she loves the children as [if] they were her own and she would do anything to have them back in her care. Yet, she admitted that she has a drinking problem and, even after two DUI's and losing placement of the children, she still consumes alcohol." A court appointed special advocate noted that on social media V.S. "often posts pictures of her drinking."

There may be an impediment to the boys' preference for adoption by S.D. and her husband, E.D., who is the boys' "blood uncle" on their mother's side. E.D. is a convicted felon. The record does not disclose E.D.'s criminal history or the nature or date of his felony conviction.

CWS evaluated the children as follows: "[They] are extraordinary children. In spite of all they have been through due to their mother's neglect and erratic living style, the children present as emotionally stable. They are intelligent and mature, yet what is most impressive about them is their amiable dispositions. . . . [W]hen the [child welfare worker] met with [them] they were polite toward the [worker] and to one another."

CWS noted that, after completing mental health services in June 2019, M.S. "began to demonstrate behaviors that warranted her return to counseling. . . . [She] was cutting herself, or threatening to cut herself, when she was depressed or, on some occasions, when she did not get her way." M.S. presently "is prescribed 25 mg of Zoloft, to treat her depression." She "said she benefits from therapy. She has not acted out with cutting behavior over the past few months."

The record includes a "Physician's Statement" (Form JV-220(A)) for M.S. that was signed by a physician on July 6, 2020, four days after the court terminated mother's parental rights. The physician performed a "face-to-face clinical evaluation" of M.S. on July 1, 2020, the day before the section 366.26 hearing. The physician diagnosed her as suffering from a "Major Depressive Disorder" and "Anxiety." The physician wrote, "When I first met [M.S.] she expressed vague thoughts of dying. She cut herself for relief. She suffered from insomnia and panic attacks." Her "depression and anxiety have improved," but she is "not

happy." She "describes feeling 'numb'." The physician recommended that she be switched from Zoloft to Prozac.

A status review report, prepared by CWS and signed in August 2019, observed, "[C.C.] does not like school and he has behavioral problems that have resulted in his being suspended for a total of sixty-six days during the last school year. However, in this review period, [he] has shown improvement both academically and behaviorally." The report continued, "Due to [C.C.'s] defiant and disruptive behaviors at school, [he] received Intensive Home Based Services . . . ." A status review report signed in February 2020 stated, "There has been a noticeable improvement with his behavior."

Adoptability: Legal Principles

"The court may terminate parental rights only if it determines by clear and convincing evidence the minor is likely to be adopted. (§ 366.26, subd. (c)(1).) The statute requires clear and convincing evidence of the likelihood adoption will be realized within a reasonable time. [Citations.] In determining adoptability, the focus is on whether a child's age, physical condition and emotional state will create difficulty in locating a family willing to adopt. [Citations.] To be considered adoptable, a minor need not be in a prospective adoptive home and there need not be a prospective adoptive parent "'waiting in the wings.'" [Citation.]" (*In re R.C.* (2008) 169 Cal.App.4th 486, 491.) The "'likely to be adopted'" standard "is a 'low threshold.'" (*In re Mary C.* (2020) 48 Cal.App.5th 793, 803.)

"The likelihood of adoptability *may* be satisfied by a showing that a child is *generally* adoptable, that is, [adoptable] independent of whether there is a prospective adoptive family ""waiting in the wings."" (*In re A.A.* (2008) 167 Cal.App.4th

1292, 1313.) "There is a difference between a child who is generally adoptable (where the focus is on the child) and a child who is specifically adoptable (where the focus is on the specific caregiver who is willing to adopt). [Citations.] 'When a child is deemed adoptable only because a particular caretaker is willing to adopt, [i.e, the child is specifically adoptable,] the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent's adoption and whether he or she is able to meet the needs of the child. [Citation.]'" (*In re J.W.* (2018) 26 Cal.App.5th 263, 267-268.)

Adoptability: Standard of Review

"When reviewing a court's finding a minor is [likely to be adopted], we apply the substantial evidence test. [Citations.] . . . [O]ur task is to determine whether there is substantial evidence from which a reasonable trier of fact could find, by clear and convincing evidence, that the minor is [likely to be adopted within a reasonable time]. [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. [Citation.]" (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 491.)

"[W]hen reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it *highly probable* that the fact was true. Consistent with well-established principles governing review for sufficiency of the evidence, in making this assessment the appellate court must view the record in the light most favorable to the prevailing party below and give due deference to how the trier of fact may have

evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995-996, italics added.)

"[S]ubstantial evidence . . . is[] evidence which is reasonable, credible, and of solid value . . . ." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "It is irrelevant that there may be [other] evidence which would support a contrary conclusion." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.)

No Substantial Evidence that the Three Older Children Are Generally Adoptable

The oldest child, A.D., has many attractive qualities. A status review report signed in February 2020 described him as "an easy going and likeable young man." The report noted, "There are no concerns regarding his emotional status at this time." During his junior year, A.D. was "accepted to the National Society of High School Scholars." The section 366.26 report said that A.D. "demonstrates the parent role and he often spoke for his younger siblings in a positive manner." He "is in the 11th grade" and "typically receives A's and B's."

Despite his attractive qualities, because of his advanced age the evidence is insufficient to show A.D. is generally adoptable, i.e., likely to be adopted within a reasonable time irrespective of whether a specific family is willing to adopt him. When the section 366.26 hearing occurred in July 2020, A.D. was 17 years old. In May 2021 he will turn 18, the age of majority. "Parental authority over a child ceases by operation of law when the child reaches the age of majority . . . ." (*In re Marriage of Jensen* (2003) 114 Cal.App.4th 587, 594; see also Fam. Code, § 7505, subd. (c).) It is common knowledge that the older the

child, the more difficult it is to find a family willing to adopt. (See § 366.26, subd. (c)(3) ["For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because . . . the child is seven years of age or older"].)[2] We have not found any appellate opinion, published or unpublished, in which the court concluded that a 17-year-old child is generally adoptable.

At the time of the section 366.26 hearing, M.S. was 16 years old. Because of her age and psychological issues, the evidence is insufficient to show that she is generally adoptable.

C.C. was 14 years old when the section 366.26 hearing occurred in July 2020. He turned 15 in September. In contrast to his older brother, A.D, C.C. had serious behavioral problems at school that resulted in his suspension for sixty-six days during one school year. There was "a noticeable improvement" in his behavior after he had received "Intensive Home Based Services through the Family Service Agency." The section 366.26 report stated that C.C. "has improved his academic performance" so that he now "typically performs within the average range." But in view of C.C.'s age and history of behavioral problems at school, there is no substantial evidence from which a reasonable trier of fact could find it highly probable that he is likely to be adopted within a reasonable time irrespective "of whether there is a prospective adoptive family ""waiting in the wings."""" (*In re A.A.*,

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[2] See also the article entitled "Older Child Adoption" on the website of North American Council on Adoptable Children, https://www.nacac.org/help/adoption-practice/older-child-adoption/ ["Younger foster children have a much better chance of finding a permanent family. Once waiting children in foster care are nine or older, they are much less likely to be adopted"].

supra, 167 Cal.App.4th 1292, 1313; see Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings* (2004) 11 Va. J. Soc. Policy & Law 176, 224 ["if the state terminates the biological mother's parental rights to a 14-year-old, she is likely to become a 'legal orphan' - a child who is legally free for adoption but for whom the state cannot find an adoptive home"].)

We recognize that, in the section 366.26 report, CWS opined, "In spite of their ages, [M.S. and the boys] are adoptable children." But CWS did not opine that the children are *likely* to be adopted *within a reasonable time*. In any event, "[a] social worker's opinion, by itself, is not sufficient to support a finding of adoptability." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.)

No Substantial Evidence that
M.S. is Specifically Adoptable

The evidence is insufficient to show that M.S. is specifically adoptable. There is no substantial evidence from which a reasonable trier of fact could find it highly probable that she is likely to be adopted by a particular family within a reasonable time. Since she is over the age of 12 years, she cannot be adopted without her consent. (Fam. Code, § 8602.)

M.S. said she wants to be placed with and adopted by her second cousin, V.S. But V.S. has a drinking problem that makes her unsuitable as a placement for M.S. The section 366.26 report stated, "CWS has assessed not to place any of the children back in her care." The report continued, "If [M.S.] cannot be placed with [V.S.] then her second choice is to move to North Carolina with her sister [J.S.] and be adopted by [J.S.'s] paternal aunt." The aunt is willing to adopt J.S. But there is no evidence that she is willing to adopt both J.S. and M.S.

Substantial Evidence Supports Finding
That the Boys Are Specifically Adoptable

The boys expressed a desire to be adopted by their uncle's wife, S.D., and her husband – the boys' blood uncle, E.D., who was present at the section 366.26 hearing.[3] But E.D.'s criminal record could block the adoption. He has a felony conviction, the nature and age of which was not disclosed. "The department [Department of Social Services] . . . shall not give final approval for an adoptive placement in any home in which the prospective adoptive parent or *any adult living in the prospective adoptive home* has been convicted of an offense for which an exemption cannot be granted pursuant to subparagraph (A) of paragraph (2) of subdivision (g) of Section 1522 of the Health and Safety Code." (Fam. Code, § 8712, subd. (c), italics added.)

The section 366.26 report stated that E.D. "has criminal history that may not be able to be exempted; however, [S.D.] shared with the [child welfare worker] that her husband said that he is willing to move out of the home. Therefore, it will take time to assess their applications and approve them for placement of the children."

A court appointed special advocate reported that, during a conference call on May 21, 2020, S.D. agreed that the boys would

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[3] At the hearing A.D. praised and expressed gratitude to S.D. and E.D. for their assistance, noting that they "took me in . . . when I was depressed." As to E.D., A.D. said, "He loved hanging out with me and his two sons. We went to the park on camping trips and Six Flags. I also went with him to work out almost daily. He is the one that got me into being active. He helped me in indoor soccer with his son. I will never forget what he has done for me." As to S.D., A.D. said, "I will never forget what she has done for me either."

be placed with and adopted by her. "CWS said . . . they will request to have parental rights terminated and move forward with the adoptions . . . ." In view of S.D.'s willingness to adopt and E.D.'s willingness to move out of the home if necessary, a reasonable trier of fact could find it highly probable that the boys are likely to be adopted by a particular family within a reasonable time. There is no evidence of a legal impediment to S.D.'s adoption of the boys if E.D. moves out of the home.

Mother claims that the evidence is insufficient because CWS "provided no evidence of approved families" willing to adopt the boys. But an approved adoption home study is not a prerequisite to a finding that a child is specifically adoptable. (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1410.)

Substantial Evidence Supports Finding that the Youngest Child, J.S., Is Likely to Be Adopted

The record contains substantial evidence from which a reasonable trier of fact could find it highly probable that J.S. is likely to be adopted within a reasonable time. When the section 366.26 hearing occurred, J.S. was 12 years old. According to a status review report signed in February 2020, J.S. "is . . . a happy child who is doing very well. There are not any ongoing concerns regarding [her] well-being." An August 2019 status report noted, "She attends school regularly. Her fifth-grade teacher commented that [she] had a positive attitude, outstanding work habits and conduct." The section 366.26 report observed that J.S. "enjoys school and she earns very good grades."

J.S. said she wants to be adopted by her aunt in North Carolina. The aunt is willing to adopt her. J.S. and her aunt were parties to the May 21, 2020 conference call. During the call, J.S. and her aunt "agreed that [placement with and adoption by

her aunt] would be the plan moving forward." "[J.S.] . . . said she wants to keep her name after adoption and her aunt said, 'of course!'"

At the close of the section 366.26 hearing, J.S. said to the court, "I was wondering if it would be possible if I would be able to be adopted by a new foster family around [V.S.'s] house." The court replied, "You need to speak to your attorney because she'll give you the legal answer and advice on all that." J.S.'s desire to explore adoption by persons other than her aunt in North Carolina does not detract from the court's finding that she is likely to be adopted within a reasonable time.

ICWA

Mother "reported that she believed she had Native American Indian heritage through her mother's side of the family, Cherokee, or Blackfoot, 'or something like that.'" Notice was given to the Bureau of Indian Affairs, the Secretary of the Interior, the Blackfeet Tribe, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee. The tribes responded that none of the children is an "Indian child" as defined by the ICWA. Without objection, the juvenile court found that the ICWA does not apply to any of the children.

Mother contends that CWS failed to give notice to the Navajo tribe. But in the present proceeding mother never said she may have Indian heritage through that tribe. She mentioned only the Cherokee and Blackfeet tribes. Nevertheless, mother claims that CWS had reason to know she may have such heritage based on records from a "previous dependency case in Wake County, North Carolina." According to the North Carolina records, in 2018 mother told a "foster care social worker that she believed that she may have Native American Heritage on her

side of the family. She was unsure of the tribe, stating it could be Nava[j]o, but said she would follow up with her mother." Because the North Carolina records were in CWS's possession, mother maintains that CWS "should have known of this disclosure."

The North Carolina records did not trigger a duty to give notice to the Navajo tribe. "[T]he agency is required to provide notice if it knows or has 'reason to know' the child is an Indian child." (*In re A.M.* (2020) 47 Cal.App.5th 303, 321 (*A.M.*)). CWS did not know or have reason to know that the children have Indian heritage through the Navajo tribe. Mother has not cited authority to the effect that CWS was put on notice of the content of records in the case file in a previous dependency proceeding in another state. If mother genuinely believed that she may have Indian heritage through the Navajo tribe, she misled CWS when in the present proceeding she mentioned only the Cherokee and Blackfeet tribes. In view of this information, there was no reason for CWS to check the North Carolina records to determine whether mother had mentioned an additional tribe in the previous dependency proceeding.

Even if CWS was put on notice of the content of the North Carolina records, mother's statement about possible Navajo heritage did not require CWS to give notice to the Navajo tribe. A similar situation occurred in *A.M.*, *supra*, 47 Cal.App.5th 303. There, the mother faulted the agency "in failing to send ICWA notices to the Blackfeet and Cherokee tribes after Mother informed the social worker that 'she believed she had Blackfoot and Cherokee heritage.'" (*Id.* at p. 321.) The court concluded: "[T]he only specific information Mother provided was a statement that she was told and believed that she may have Indian ancestry with the Blackfeet and Cherokee tribes but was not registered.

She also listed her grandfather, C.M., as having possible Indian heritage but never provided additional information concerning her Indian ancestry. We are not persuaded that Mother's statements, alone, were sufficient to trigger the ICWA notice provisions." (*Id*. at p. 322.)

Disposition

As to M.S., the order terminating mother's parental rights and selecting adoption as the permanent plan is reversed. As to the other children – A.D., C.C., and J.S. – the order is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Emery El Habiby, under appointment by the Court of Appeal, for Objector and Appellant.

Michael C. Ghizzoni, County Counsel, Lisa A. Rothstein, Sr. Deputy, for Petitioner and Respondent.